No. 20245

In the

United States Court of Appeals

For the Ninth Circuit

EDGAR T. WEEKES and CATHERINE H. WEEKES,
Appellants,

vs.

ATLANTIC NATIONAL INSURANCE CO., a Florida corporation, et al.,
Appellees.

CALIFORNIA STATE AUTO ASSOCIATION INTER-INSURANCE BUREAU, a California corporation, and SAMUEL ROTANZI,
Appellants,

vs.

ATLANTIC NATIONAL INSURANCE CO., et al.,
Appellees.

ATLANTIC NATIONAL INSURANCE CO., a Florida corporation,
Appellant,

vs.

CALIFORNIA STATE AUTO ASSOCIATION INTER-INSURANCE BUREAU, a California corporation; SAMUEL ROTANZI; and EDGAR T. WEEKES and CATHERINE H. WEEKES, husband and wife,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Brief for Appellees California State Automobile Association Inter-Insurance Bureau and Samuel Rotanzi

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

California State Automobile Association Inter-Insurance Bureau (California State) is an inter-insurance bureau with its principal office in the State of California, and is a citizen of that state. Samuel Rotanzi ((Rotanzi) is a citizen of the State of California. Atlantic National Insurance Co. (Atlantic) is a Florida corporation; it was the only plaintiff in the District Court and is an appellant and appellee in this appeal, as are California State and Rotanzi. Edgar T. Weekes and Catherine H. Weekes are citizens of Arizona. They were defendants below with California State and Rotanzi, and are also appellants and appellees on various issues before this court.

The amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars.

All the jurisdictional facts were established in the District Court by the allegations in the second amended complaint (R-2), which allegations were not denied and were in fact admitted.

The District Court had jurisdiction under the provisions of 28 U.S.C.A. § 1332. The judgment of the District Court was rendered by the United States District Court for the District of Arizona on May 13, 1965. All parties before the District Court have appealed from certain portions of said judgment. This Court has jurisdiction upon this appeal to review the said judgment under the provisions of 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

Atlantic's statement of the case is adequate and we will not elaborate on it.

SUMMARY OF ARGUMENT

1. California State's policy is not ambiguous.

2. This case does not involve a conflict between a pro rate clause and an excess clause and therefore the law applicable to such a conflict does not apply.

3. When there is a conflict between two excess clauses the owner's policy does and should provide primary coverage.

4. The excess clause of Atlantic's policy is different from the excess clause in California State's policy. The two clauses are not mutually repugnant and therefore Atlantic's policy does and should provide primary coverage.

ARGUMENT

I. California State's Policy Is Not Ambiguous.

Atlantic's first argument is that California State's policy is ambiguous in that the following provision is ambiguous:

> "If the insured has *other insurance* against a loss covered by Part I of this policy the Bureau shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; *provided, however the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance.*" (Emphasis added)

Initially, it is clear that the language of the quoted provision is free from ambiguity. It provides that where the insured has overlapping coverage California State's liability is pro rated with all valid and collectible insurance covering the loss. It also provides that this proration is not applicable with respect to a non-owned automobile such as the insured was driving in this case at the time of the

accident. It states that in such an instance its coverage shall be excess insurance to all other insurance.

The Courts have had no difficulty in construing such a provision and have construed it as we have stated it should be construed.

Thus, in *Athey v. Netherlands Insurance Company,* 19 Cal. Rptr. 89 (D.C.A. Cal. 1962), the policy provided:

> "The provision of Athey's National policy important here follows: 'If the insured has other insurance against a loss covered by Part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; *provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over and other valid and collectible insurance.*'"

In commenting upon the meaning of the provision, the court said:

> "The portion of the above provision applying to liability incurred by Athey while operating a nonowned automobile is that underlined. Thus, it appears that the National policy is primary insurance for any loss while Athey is operating his own automobile, but that if other insurance covers Athey, National's liability for loss while Athey is operating his own automobile is a pro rata one, to be determined in proportion to the limits of liability expressed in its and the other insurance policies. However, if other insurance covers Athey while operating a nonowned automobile, then National's policy becomes excess over the other insurance, if it is valid and collectible."

In *American Automobile Ins. Co. v. Republic Indemnity Co.*, 341 P.2d 675, 678 (Cal. 1959), the Court construed an identical standard provision:

> "The *only* construction of the 'other insurance' clause under which both its parts will be meaningful is that *the excess provision alone controls in every situation which falls within its terms, such as when a person is driving the car of another* and both the driver and the owner have insurance, and that the *prorate* provision alone governs in all other situations, for example, when more than one policy has been issued to the same person. When the driver's insurance is excess, it necessarily follows that the insurance of the owner is primary, and therefore the owner's insurer must bear the entire loss to the extent of the limits of the policy." (Emphasis added)

Atlantic argues that its "excess" clause is clearer than California State's and that consequently California State's policy is ambiguous. This argument is without merit. As the Court said in *Cosmopolitan Mutual Insurance Co. v. Continental Casualty Co.*, 14 Atl. 2d 529 (N. J. 1959):

> "Where the intent is clear, the fact that one of the insurers stated its intent more specifically than the other is not significant."

Atlantic cites *Norris v. Pacific Indemnity Co.*, 237 P.2d 666 (D.C.A. Cal. 1952) for the proposition that "the ambiguity should be resolved against the issuing insurer (App. Brief P. 41)." Since California State's provision is unambiguous, *Norris* is inapplicable to our case. However, we believe that *Norris* is inapplicable for another reason.

In *Norris* the ambiguity in question was the scope of the word "permission": was a friend of the insured's son a permissive user when the insured's son had permission to drive

the car, but had been instructed not to allow anyone else to drive the car.

In resolving this ambiguity, the Court had to choose between one interpretation which would make the insurer potentially liable or another interpretation which would unconditionally absolve the insurer from liability. The Court said:

> "Any ambiguity in the terms of a policy must be resolved against the insurer. An interpretation affording the greatest measure of protection to the assured will always be favored."

The holding in *Norris* is that when the *insured* may be disadvantaged by one interpretation, the Court will favor the interpretation most favorable to the insured and least favorable to the insurer.

The rule of construction adopted by the Court in *Norris* has no application to our case. Cf. *Employers Mut. Liability Ins. Co. v. Underwriters at Lloyd's,* 177 F.2d 249, (7th Cir. 1949). The issue in our case is not one of protecting the insured and his victims, but merely of allocating the coverage between two insurers. California State does not contend (aside from the res judicata issue) that under no circumstances will it be liable. Rather, its position is that it is subject to liability under its policy only if the policy limits of Atlantic's policy are not sufficient to satisfy the adjudged liability. Under this interpretation, the only reasonable interpretation of California State's provision, the insured will receive the same measure of protection regardless which insurer is held primarily liable.

Atlantic has failed to cite a single case to support its assertion that California State's quoted provision is ambiguous. There is no such law.

Faced with the absence of any law to support its claim of ambiguity, Atlantic presents us with its analysis as to how the ambiguity arises.

It claims that "the manner in which the two clauses [i.e. the two parts of the one sentence quoted] are put together and the manner in which the purposed excess clauses is worded makes its meaning ambiguous and makes the provision as a whole subject to two conflicting interpretations." A.O.B., p. 37.

The obvious interpretation is the one set forth above and the one reached by the Courts. The interpretation created by Atlantic is explained as follows:

> "The equally obvious meaning of the provision is that if the *insured has* other insurance the Bureau will prorate its liability with the other insurance in all cases except when there is *insurance with respect to a temporary substitute or non-owned automobile* in which case the Bureau considers that insurance (insurance with respect to the temporary substitute automobile) as excess insurance—that is, the insurance that follows the car is excess. Insurance that follows the insured is to be prorated." A.O.B., p. 39.

This is difficult to follow. We believe it helpful to make certain insertions in the above interpretation (which insertions we will set forth in capital letters) in order to understand what Atlantic is really saying so we can assess the validity of its argument. Atlantic is apparently really saying:

> "The equally obvious meaning of the provision is that if the *insured has* other insurance the Bureau will prorate its liability with the other insurance in all cases except when there is *insurance with respect to a temporary substitute or non-owned automobile* in which case the Bureau considers that insurance (insurance

with respect to the temporary substitute automobile NAMELY, THE INSURANCE OF THE OTHER CARRIER, THE OWNER'S INSURER, ATLANTIC) as excess insurance—that is, the insurance that follows the car is excess WHEREAS OUR INSURANCE, THE INSURANCE OF CALIFORNIA STATE, THE DRIVER'S INSURER, IS PRIMARY. Insurance that follows the insured is to be prorated."

This interpretation is absurd for a variety of fundamental reasons:

1. Insurance carriers are not in the habit of putting provisions in their policies which decrease the liability of other carriers for the same loss and increase their own liability for the loss.

2. The effect of Atlantic's interpretation of California State's policy would be to have California State's exposure greater when its insured was driving someone else's car than when he was driving his own. This is true because under Atlantic's interpretation in the event of an accident when the insured is driving his own car there would be a pro rate with other insurance, but there would not be a pro rate if the insured were driving a non-owned car. In the latter situation, under Atlantic's interpretation, California State's policy would be primary and a pro rate would not be allowed. This does not make common sense, economic sense or underwriting sense. California State's policy is intended primarily to protect the insured from liability arising out of his ownership of an automibile. The coverage provided for liability arising out of the use of non-owned cars is merely incidental to the main purpose of the policy. Yet under Atlantic's interpretation of the provision, the coverage of California State's policy would be broader as to non-owned cars than as to owned cars. See for example *Olson v. Hertz Corporation,* 133 N.W.2d 519, 523 (Minn. 1965) where the Court said:

". . . the policy of insurance . . . considered in its entirety appears to have been designed primarily to afford coverage for liability arising out of ownership, maintenance, or use of the pleasure automobile owned by [the named insured] and operated by him for non-business purposes. The coverage afforded for liability imposed on him when operating a vehicle other than the one described in the policy appears to have been intended primarily to avoid a liability exposure during incidental use of vehicles other than the one described in the policy."

3. The language after the semi-colon is by its position, by the verbiage employed and by virtue of the phrase "provided, however" a clause restricting rather than increasing the amount of coverage previously provided for in the sentence.

4. The other provisions in California State's policy which are set forth rather than creating an ambiguity reaffirm that the clear purpose of California State's policy throughout the policy is to afford only excess coverage where the car being driven is a non-owned vehicle.

Thus, there is no ambiguity. Atlantic's argument is without legal, logical or interpretive support.

I. This Case Does Not Involve a Conflict Between a Pro Rate Clause and an Excess Clause and Therefore the Law Applicable to Such a Conflict Does Not Apply Here.

On pages 42 and 43 in its opening brief Atlantic discusses the applicable law when there is a conflict between an excess clause and a pro rate clause.

The discussion is inappropriate. The Atlantic policy does not contain a pro rate clause; it only contains an excess clause. The pro rate clause in California State's policy is

not applicable where the car being driven is non-owned as is the situation here. Thus we do not have in this case a conflict between an excess clause and a pro rate clause.

Atlantic cites three cases in support of its inapplicable "general rule": *Norris v. Pacific Indemnity Co.,* 237 P.2d 666 (D.C.A. Cal. 1952); *Speier v. Ayling,* 45 A.2d 385 (Pa. 1946); *Trinity Universal Ins. Co. v. General Accd. Fire & Life Assur. Corp.,* 35 N.E.2d 836 (Ohio 1941). None of these cases had facts similar to the facts in this case.

In *Norris,* supra, the owner's policy contained only a pro rate clause. In this case the owner's policy contains only an excess clause. Thus the cases differ basically. The Court held the owner primarily liable.

In *Speier,* supra, both policies had pro rate clauses. The owner's policy did not contain, as it does here, an excess clause. The driver's policy did have an excess clause. The owner was held primarily liable.

Trinity, supra, is simply not applicable at all.

Thus the conflict suggested does not exist and the cases cited do not apply.

III. When There Is a Conflict Between Two Excess Clauses the Owner's Policy Does and Should Provide Primary Coverage.

IV. The Excess Clause of Atlantic's Policy Is Different from the Excess Clause in California State's Policy. The Two Clauses Are Not Mutually Repugnant and Therefore Atlantic's Policy Does and Should Provide Primary Coverage.

Atlantic's third argument is that if we have in this case two excess clauses, effect must be given to both with a consequential pro rate.

We first observe that no cases have been produced which indicate that in an "excess" vs. "excess" situation the driv

er's policy will be held to provide primary coverage and the owner's policy will only provide excess coverage.

However, there are cases holding that in the "excess" vs. "excess" situation with identical excess clauses, the owner's policy will be held to provide primary coverage and the driver's policy will only provide excess coverage. *Farm Bureau Mut. Automobile Ins. Co. v. Preferred Acc. Ins. Co.*, 78 F. Supp. 561 (D.C. Virg. 1948).

We believe this interpretation makes sense for reasons we have previously set forth:

California State's policy is intended primarily to protect the insured from liability arising out of his ownership of an automobile. The coverage provided for liability arising out of the use of non-owned cars is merely incidental to the main purpose of the policy. Yet under Atlantic's interpretation of the provision, the coverage of California State's policy would be broader as to non-owned cars than as to owned cars. See for example *Olson v. Hertz Corporation,* 133 N.W. 2d 519, 523 (Minn. 1965) where the Court said:

> ". . . the policy of insurance . . . considered in its entirety appears to have been designed primarily to afford coverage for liability arising out of ownership, maintenance, or use of the pleasure automobile owned by [the named insured] and operated by him for non-business purposes. The coverage afforded for liability imposed on him when operating a vehicle other than the one described in the policy appears to have been intended primarily to avoid a liability exposure during incidental use of vehicles other than the one described in the policy."

See also *Employer's Liabil. Assur. Corp. Ltd. v. Fireman's F. Ins. Gr.,* 262 F.2d 239 (D.C. Cir. 1958). Here the United States Court of Appeals for the District of Columbia held

CONCLUSION

Atlantic's specifications of error II, III and IV are without basis in law or fact and the District Court's decision determining Atlantic's coverage is primary should be sustained.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By JOHN J. O'CONNOR III